Nos. 22,188 and 22,188-A

United States Court of Appeals

For the Ninth Circuit

BEVERLY J. McCONNELL, *Appellant,* vs. ESTATE OF BUTLER, *Appellee,*	No. 22,188
and OSCAR STROBLE, Trustee, *Appellant,* vs. ESTATE OF BUTLER, *Appellee.*	No. 22,188-A

On Appeal from the United States District Court for the District of Arizona

APPELLANT'S CLOSING BRIEF

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NO TRANSCRIPT OR SUMMARY OF THE EVIDENCE

Appellant directs attention to the argument of Appellee that there is not sufficient record on which to predicate a reversal or modification of the Referee's Order allowing fees to Appellant. We do not agree with this contention. If it has merit, Appellant should not be penalized because she sought, by objections to the Referee's Certificate on Review and by request for amendments thereto, to have either a transcript of the evidence or a summary thereof. The District Court denied her objections and request. It

is because of this situation that Appellant asks for the matter to be referred back to the Referee if the Court does not agree with the contention of Appellant that the allowance of only $8,000.00 as a fee is so low as to amount to an abuse of discretion. Would it not have been more appropriate if counsel for Appellee had joined in the request of Appellant before this matter reached this Court, rather than to here seek an advantage because of the asserted insufficiency of the record?

The designation of the Estate of Butler as the sole Appellee, says counsel for Appellee, "is probably legally incorrect and factually an error." However designated, the fact remains that the Estate of Butler is the only creditor or party who objected to the fee sought by Appellant.

The record shows that Appellee's counsel were the lawyers for E. W. Reynolds Company prior to its bankruptcy and have since represented the family who substantially owned the company in the bankruptcy proceedings. This situation should be borne in mind when considering the argument made in behalf of Appellee that the efficiency and organization of the E. W. Reynolds Company was so great that it, even in bankruptcy, could run itself; that its debtors would pay their indebtedness (accounts receivable) without collection efforts by the Trustee; that its fame was so great that in liquidation its assets sold themselves; that the services of Appellant were wasted efforts; and that there was just nothing for Appellant, as counsel for the Trustee, to do. This

bankrupt thought the value of all of its accounts receivable was only $50,000.00. It thought its merchandise inventory had a value of only $35,500.00 and that its furniture and fixtures had a value of only $1,650.00. Bankrupt didn't think its name had any value at all.

Factually, as in any Bankruptcy, the "birds of prey" do gather—and debtors for some reason or other believe there is no longer any need to make payment. Even in the best of bankruptcies it takes intensified effort to realize for creditors a reasonable market value—a "top dollar" for assets in liquidation. The E. W. Reynolds Company was no different. It was just because of the obvious value of the business and its various components that maximum effort was expended by the Trustee and Appellant; that solicitation of offers to purchase and negotiation for sale of the assets were conducted on a greater basis than in the normal case. The assets of this bankrupt company were not "dumped on the market" as is sometimes the case. The efforts of the Trustee, the Attorney for the Trustee and the Creditors' Committee were very successful—and the Trustee did realize an outstanding sum on liquidation. The record will show that this was within a minimum time. The processing of the accounts receivable, however, took approximately twenty-one (21) months due to the fact that some did have extended terms of payment, that suits in some instances were required, and that even where voluntary payment was possible the Trustee found it necessary in many cases to grant additional time for payment and to allow payouts on an installment basis.

DELAYS IN CLOSING ESTATE

Contrary to the suggestion of Appellee, any delay in the closing of the estate was not occasioned by Appellant or the Trustee. The Trustee filed his final account and requested the estate be closed in May of 1965. No ruling was made by the Referee on the questions presented at the final meeting of creditors until October of 1966. A Petition for Review was filed in November of 1966. The Referee's Certificate on Review was not filed until March of 1967. The lack of payment of partial dividends was not by choice of the Trustee or Appellant, but rather was due to the refusal of the Referee to permit same.

EFFICIENCY OF TRUSTEE'S ADMINISTRATION

A review of the entire record will show the efficiency of the Trustee's administration. The efficiency of that administration is substantially the result of the efforts of Appellant in her guidance and representation of the Trustee, in her assistance in negotiating for sale of the assets and in her arranging for the interest-bearing deposit of the estate's funds. The success of the Trustee in collection of the accounts receivable after the first meeting of creditors is due entirely to the efforts of Appellant as Attorney for the Trustee.

TIME ELEMENT

Appellant has requested a fee of $30,000.00. The record reflects that Appellant has reported approxi-

mately 100 hours were expended in general administrative work up to the time of the final meeting of creditors. An additional 100 hours of time has also been reported on accounts receivable work. It is not a fact that the second 100 hours was the total amount of time expended in collecting accounts receivable. The record shows that Appellant has, at all times, advised that she did not keep time records of work done on collection matters; that they were handled by her office employees, she having an established system for processing collection of accounts on a volume basis, and that it is physically impossible to report time expended in collection work. No doubt the amount of time spent on the receivables did run into many hundreds of hours. Surely a court, no more than an astute businessman, expects that it will be asked to pay for collection work on a time basis. No one, realistically, will pay for time devoted that does not result in collections.

ACCOUNTS COLLECTED

Argument is made that $90,000.00 to $100,000.00 of the accounts receivable were current. "Current" is not synonymous with "good" or "collectible", particularly when the creditor is in bankruptcy. The bankrupt knew this when it scheduled the accounts receivable as having a value of $50,000.00. The fact is inescapable that, had Appellant not undertaken collection of the accounts receivable (slightly under 500 accounts) and assumed in her office all of the expense

thereof, the creditors would have realized $46,000.00 less on these accounts.

INTEREST ON SAVINGS ACCOUNTS

The fact remains that the interest earned on monies of the estate is the result of the sole effort of Appellant. Appellee's counsel, attempting to minimize, or to allocate the service entirely to the receivership, is not convincing. The result speaks for itself.

SUCCESS

All authorities agree it is the success of the work undertaken which is of paramount importance in determining the reasonableness of a fee. *Collier on Bankruptcy,* 14th Edition, Sec. 62.12(5), pp. 1488-1489, states:

> ". . . economical is by no means synonymous with 'parsimonious', and should not exclude a compensation that is under all the circumstances of the case fair and reasonable. To reserve as much as possible for distribution to the creditors is one postulate, but there is another, perfectly compatible with the former, not to discourage needlessly able and competent lawyers from accepting a retainer in bankruptcy by denying them reasonable remuneration. A misunderstood economy in this respect may lead to evils far greater than the sacrifice imposed on the individual creditor by reason of an equitable allowance for meritorious and diligent counsel."

The District Court has mistaken the intent of the Bankruptcy Act in determining the standards to be applied in fixing a reasonable fee for services rendered by Appellant. In *Jacobowitz v. Double Seven Corporation,* 378 F.2d 405, June 5, 1967, this Court has once and for all clarified that "determining reasonable fees in Bankruptcy cases is no different from determining them in private employment except that the spirit of the Bankruptcy Act would seem to require a Court to fix such fees at the lower end of the spectrum of reasonableness." No longer can fees less than those normally allowed in the community be justified as reasonable in bankruptcy proceedings.

We urge that this Court should, in light of its ruling in the *Jacobowitz* case, reappraise the allowance of the fee to Appellant herein, to take into consideration the benefit which has flowed to the bankrupt estate and its creditors from the services rendered by Appellant.

> ". . . it is not surprising to find that aside from the principle of economy the results achieved constitute the factor of greatest determinative weight.
>
> > 'Success is the test applied by the business world in measuring compensation. It is largely so in the course. As a rule professional services however able or prolonged which yield no results command no higher reward.'
>
> "This implies that (1) great success and benefit to the estate command a liberal compensation and (2) all effort and labor may go virtually without reward where benefit accrued to the estate. Benefit to the estate as a yardstick for measuring the

value of attorney services has been recognized by the Supreme Court in *Randolph v. Skruggs,* 190 U.S. 533."

CONCLUSION

Considering the quality and quantity of services rendered by Appellant, the benefit which the creditors have and will realize therefrom, and the standards for determining the reasonableness of a fee as set forth in the *Jacobowitz* case, it ought to be concluded that $30,000.00 is the reasonable fee to be allowed to Appellant herein.

Dated, Phoenix, Arizona,
February 22, 1968.

Respectfully submitted,
STOCKTON & HING,
By HENDERSON STOCKTON,
Attorneys for Appellant
Beverly J. McConnell.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENDERSON STOCKTON.